

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

NUTECH INDUSTRIES, INC.

And

Case 3-CA-20880

UNITED BROTHERHOOD OF CARPENTERS
AND JOINERS OF AMERICA, AFL-CIO,
LOCAL 229

Robert A. Ellison, Esq., of Albany, NY, for
the General Counsel.

DECISION

Statement of the Case

Bruce D. Rosenstein, Administrative Law Judge. This case was tried before me in Albany, New York on June 15, 1998, pursuant to a Complaint and Notice of Hearing (the complaint) issued by the Regional Director for Region 3 of the National Labor Relations Board (the Board) on December 23, 1997.¹ An amendment to the complaint was issued in May 1998. The complaint, based upon an original charge filed on September 11, and an amended charge filed on October 6, by United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Local 229 (the Charging Party or Union), alleges that Nutech Industries, Inc. (the Respondent or Nutech), has engaged in certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). Respondent's timely filed answers to the original and amendment to the complaint denies the commission of any unfair labor practices.

Issues

The complaint alleges that the Respondent engaged in independent violations of Section 8(a)(1) of the Act by threats to close its business and discharge union supporters in the event its employees selected a union as bargaining representative, threats to employees to eliminate work opportunities for employees who supported a union, interrogating its employees concerning their union and/or protected activities and creating the impression of surveillance of its employees union activities, engaged in additional violations of Section 8(a)(1) of the Act by imposing two week suspensions on three employees because they concertedly complained regarding wages, hours, and working conditions, and engaged in a violation of Section 8(a)(1) and (3) of the Act by terminating the leading union adherent.

¹ All dates are in 1997, unless otherwise indicated

On the entire record, including my observation of the demeanor of the witnesses, I make the following²

Findings of Fact

I. Jurisdiction

The Respondent, a corporation, with an office and place of business in Queensbury and Glens Falls, New York, is a general contractor in the building and construction industry, where it annually purchased and received at its jobsites located within the State of New York, goods and materials valued in excess of \$50,000 directly from points located outside the State of New York. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Despite the denial of labor organization status in the answer, I find that the Union is a labor organization within the meaning of Section 2(5) of the Act, based on Respondent's execution of a stipulated election agreement on September 26, in Case 3-RC-10598, for the conduct of a Board supervised election on October 8 (G.C. Ex. No. 9).

II. Alleged Unfair Labor Practices

A. *Background*

The Union, in August 1997, commenced a campaign to organize and represent Respondent's employees and filed an election petition with the Board on September 11. Thereafter, a stipulated election agreement was approved on September 26, and an election was held on October 8. The Union lost the election and since October 8, has not engaged in any additional organizational activities.

At all material times, Timothy Barber holds the position of president, Thomas Barber is vice president and Richard Barber serves as Respondent's foreman and first line supervisor.

² The Respondent did not appear or present testimony, despite having ample advance notice about the scheduled date, time and place of the hearing. In this regard, Respondent's attorney filed an answer to the complaint on January 2, 1998. Thereafter, Respondent's President filed an answer to the amended complaint. By letter dated June 8, 1998, Respondent's attorney apprised all parties that he was not authorized to represent Nutech and withdrew from the case. The General Counsel, as reflected in the transcript at pages 6 through 9, had a number of telephone discussions with representatives of the Respondent in regard to the subject case, faxed at Nutech's request a copy of the complaint and the amendment to the complaint prior to the scheduled hearing, and apprised the Respondent by fax transmission dated June 9, 1998, that the time of the hearing was changed from 11a.m. to 1p.m. Additionally, the General Counsel left a number of telephone messages on Nutech's answering machine about the status of the case including a message on the day of the hearing, at my direction, to determine whether the Respondent was planning on attending the hearing. Since a voice mail recording confirmed that it was the offices of Nutech but no one was available to take the telephone call and no further communication was received from Nutech, I determined to go forward on the record with the General Counsel's case.

B. *The 8(a)(1) Violations*

1. Independent Violations

5 The General Counsel alleges in paragraph 6 of the complaint that Respondent's
representatives Timothy Barber and Richard Barber engaged in independent violations of
Section 8(a)(1) of the Act by threats to close its business and discharge union supporters in the
event its employees selected a union as bargaining representative, threats to employees to
eliminate work opportunities for employees who supported a union, interrogating its employees
10 concerning their union and/or protected activities and creating the impression of surveillance of
its employees union activities.

15 Employee Todd Phillips credibly testified that he contacted the Union in early August
1997, and attended a meeting around August 12, with co-workers to discuss issues about
wages and overtime pay. The Union arranged a second meeting to discuss these issues and
on August 26, a number of employees signed union authorization cards. Phillips obtained
additional authorization cards at this meeting and was actively involved in distributing them to
other employees at their homes and Nutech jobsites. On or about September 9 during lunch,
while working at the Jackson Summit jobsite in Mayfield, New York, Richard Barber came up to
Phillips and said, "it is not a good decision to go Union, Tim just got a letter in the mail that said
20 that you, Gibson and Dale had all signed union cards." Phillips said, "it's a bunch of bull."
Richard Barber then went to the construction trailer, returned about 15 minutes later and said to
Phillips, "Tim said that you are a liar and are the instigator of the whole thing." On October 8,
the day of the Board election, Richard Barber asked Phillips how the Union was treating him.

25 Employee Dale Barrett attended both union meetings and signed a union authorization
card on August 26. Several days after signing the card, Richard Barber approached Barrett
while he was working at the Jackson Summit dam job. Barber asked Barrett, "how the Union
meeting went and what was discussed?" Barber also told Barrett during the conversation that
30 "the employees should not go union, that he should tell Timmy that he had nothing to do with
the Union and that would secure his job, and that Tim would close the doors before it went
union."

35 Employee Gibson "Dean" Phillips, the brother of Todd Phillips, also attended the two
union meetings and signed a union authorization card on August 26. On September 26, while
Dean was working at the Harris Building jobsite, Richard Barber told him that "Todd was laid off
and was being punished because of being the ringleader." On October 1, while working at the
Luzerne Mountain Road jobsite, Dean observed a number of his co-workers wearing hats that
said, "Vote No". A number of employees told Dean that if you wear the hat for a week, you
would get a bonus. Richard Barber told Dean, who was not wearing a hat, "that if you do not
40 wear the hat then you will be fired." Dean replied, "he would not wear the hat." Barber said,
"you are going to get fired and Timmy will not like the fact that you will not wear the hat."

45 Employee Richard Bailey was hired at Nutech during the first week of October 1997, just
before the union election. During his employment interview, Timothy Barber asked him how did
he feel about Unions? In early October 1997, while working at the Luzerne Mountain Road
jobsite, Richard Barber asked Bailey how do you feel about the Union? Bailey responded, that
he did not care one way or the other. Barber said, "one guy was already let go because of the

Union and Todd was an instigator and ringleader in trying to get a union started and he was done with the company because of wanting to get the union started.”

The general test applied to determine whether employer statements violate Section 8(a)(1) of the Act is “whether the employer engaged in conduct which reasonably tends to interfere with, restrain, or coerce employees in the free exercise of rights under the Act.” *NLRB v. Aimet, Inc.*, 987 F. 2d 445 (7th Cir. 1993); *Reeves Bros.*, 320 NLRB 1082 (1996).

I fully credit the un rebutted testimony of Todd Phillips, Gibson Phillips, Dale Barrett and Richard Bailey that Respondent’s representatives Timothy and Richard Barber interrogated them about their union activities, created the impression of surveillance of their union activities, threatened to close the business and to eliminate work opportunities because they supported the Union and informed them that Todd Phillips had been laid off and terminated because he was the instigator and ringleader and had supported the Union.

Based on the forgoing, I find that such statements tend to coerce employees in the exercise of their Section 7 rights and that they violate Section 8(a)(1) of the Act. See *T & J Trucking Co.*, 316 NLRB 771 (1995) (threatening plant closure and discharge); *Tube-Lock Products*, 209 NLRB 666, 669 (1974) (futility of selecting a union as collective-bargaining representative) and *House Calls, Inc.*, 304 NLRB 311 (1991) (coercive interrogation).

2. The two week suspensions

On July 16, employees Todd Phillips, Gibson Phillips and Dale Barrett received there pay vouchers for the week of July 7 through 13 (G.C. Ex. No. 12). The three employees noted that their pay did not reflect 12 hours of overtime that they each worked during that pay period. The employees discussed the discrepancy among themselves and decided that the next morning they would not report to the jobsite but rather would drive to Nutech’s offices to protest to Timothy Barber that their overtime pay was missing and demand immediate reimbursement. The employees credibly testified that on a number of occasions prior to July 16, they experienced trouble in getting the correct amount of pay and discussed this issue with other employees.

On the morning of July 17, the two Phillips brothers and Barrett drove to Nutech’s offices and met with Thomas Barber in the absence of President Timothy Barber. Vice President Barber wanted to know why the three men were not at their assigned jobsite. The men explained the discrepancy in their paychecks and demanded an immediate reimbursement. Barber told the men that he was not authorized to write an immediate check but the matter would be resolved. He further told them that Tim is going to be upset and they should head to the jobsite. The three men left the Nutech offices and went home rather than returning to the jobsite.

On July 18, the three men reported to the jobsite at 7a.m. and immediately went up to Timothy Barber to discuss the pay issue. Barber told all three employees that other people had taken their place and he had no work for them. The three employees credibly testified that there were three employees working at the jobsite in addition to a foreman and it appeared that there was enough work available to accommodate them. The men left the jobsite and returned to their residences. During the period between July 18 and 23, each of the three employees attempted to telephone representatives of Nutech to resolve the matter but no one would return

their telephone calls.

On July 23, each of the three employees received a separate letter from Timothy Barber placing them on two-week suspensions, without pay.³

5 The General Counsel alleges in paragraph 7 of the complaint that Todd Phillips, Gibson Phillips and Dale Barrett concertedly complained to Respondent regarding wages, hours, and working conditions and on July 23, Nutech imposed two week layoffs because the employees engaged in these protected concerted activities.

10 The protected nature of the three employees efforts to protest Respondent's discrepancy in their overtime pay has long been recognized by the Board who has held that such conduct comes within the guarantees of Section 7 of the Act. See *Joseph De Rario, DMD, P.A.*, 283 NLRB 592 (1987).

15 The record also contains evidence that the three employees actions were concerted, as the Board has held in *Meyers Industries*, 268 NLRB 493, 497 (1984) ruling that "to find an employee's activity to be 'concerted', we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself. Once the activity is found to be concerted, an 8(a)(1) violation will be found if, in addition, the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action at issue (e.g., discharge) was motivated by the employee's protected concerted activity." Here, there can be no doubt that Respondent was aware of the concerted nature of the employee's activity, since the evidence set forth in the July 23 letter from Timothy Barber to each of the three employees shows that the three employees appeared at the office on Dix Avenue to dispute their hours paid for the week ending July 13, 1997. The letter goes on to state that "you and two of your co-workers grouped together and technically forfeited your jobs."

30 As a result of the employee's protest concerning the discrepancy in their overtime pay, the three employees were suspended, without pay, for the weeks of July 21 and 28.

Based on the forgoing, I find that the Respondent violated Section 8(a)(1) of the Act

³ The letter to each employee is identical and states in pertinent part:

35 You failed to report for work at the assigned job site on Thursday, July 17, 1997. Instead you chose to appear at the Office on Dix Avenue to dispute your hours paid for the week ending July 13, 1997.

40 I cannot comprehend this kind of action on your part. Would it not have been better to try and contact either myself, Elaine or one of the supervisors to discuss what you considered an underpayment for hours worked? Instead, you and two of your co-workers grouped together and technically forfeited your jobs.

45 Your actions show this Company, and its staff, your lack of intelligence and maturity and because of this action, and similar actions in the past where we have been more than lenient, you are suspended, without pay, through Friday, August 1, 1997. You are to report to work on Monday, August 4, 1997. Call the Office on Friday, August 1, 1997, for your job assignment. Should you fail to report to work on Monday, August 4, 1997, you will be considered to have voluntarily quit your employment with NUTECH Industries.

when it suspended employees Todd Phillips, Gibson Phillips and Dale Barrett for two weeks because they protested a discrepancy in their overtime pay. *Robert J. Moore, d/b/a B&D Custom Cabinets*, 310 NLRB 817 (1993).

C. The 8(a)(1) and (3) Violation

5 The General Counsel alleges in paragraph 8 of the complaint that on September 23, the Respondent terminated the employment of Todd Phillips because he engaged in union and protected concerted activities in violation of Section 8(a)(1) and (3) of the Act.

10 Todd Phillips credibly testified that on July 16, he received his pay voucher for the week of July 7 through 13 and determined, along with fellow employees Gibson Phillips and Dale Barrett, that there was a discrepancy in their overtime pay. He along with the above noted employees protested the overtime discrepancy to Thomas Barber on July 17, and again on July 18 to Timothy Barber, who informed the employees that other people had replaced them and there was no work available. By letter dated July 23, Barber placed Todd Phillips along with
15 the two other employees on two-week suspensions without pay.

20 Todd Phillips returned to work on August 4, and shortly thereafter contacted the Union to discuss issues concerning wages and overtime pay. Phillips attended two Union meetings and at the second meeting on August 26, signed a union authorization card. He also obtained additional authorization cards and distributed same to fellow employees at their homes and on the Respondent's jobsites.

25 Phillips had a conversation with Richard Barber on the jobsite shortly after he signed the union authorization card, wherein Barber told him that it was not a good decision to go union and that Tim had received a letter in the mail which said that Todd, Gibson and Dale signed union cards. Barber also told Phillips that Tim said he was a liar and the instigator of the whole thing.

30 On September 23, Richard Barber told Phillips that Respondent was running out of materials and work and that he would call Phillips when work was available. Phillips called Barber on several occasions after September 23, but was unable to receive a definite answer whether work was available or when to resume employment. Accordingly, Phillips obtained employment with another company on September 30, but testified that around that time, forman Barber telephoned him and said he could return to work. Since Phillips was already working for
35 another company, he did not accept the offer.

40 Employees Gibson Phillips and Richard Bailey credibly testified that Richard Barber told them after Todd Phillips layoff, that he was the ringleader and instigator of the Union and that Phillips was done with the company because of wanting to get the union started and was punished for that reason.

In *Wright Line*, 251 NLRB 1083 (1990), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, the General counsel must make a prima facie showing sufficient to support the inference that protected conduct was a “motivating factor” in the employer’s decision. On such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board’s *Wright Line* test in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1993). In *Manno Electric*, 321 NLRB 278 fn 12 (1996), the Board restated the test as follows. The General Counsel has the burden to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity.

For all of the above reasons, particularly noting the unrebutted statements attributed to Richard Barber, I find that the General Counsel has made a strong showing that the Respondent was motivated by antiunion considerations in terminating Todd Phillips. Additionally, I find that Richard Barber’s statement to Phillips on September 23, that Respondent was running out of work to be pretextual, based on Phillips unrebutted testimony that the Respondent advertised in the Glens Falls newspaper just prior to September 23 for workmen capable of performing the same job duties as Phillips (G. C. Ex. No. 14), and that several employees were hired just before he was terminated on September 23. Likewise, Richard Bailey testified that after he was hired in early October 1997, Respondent hired three additional employees. Additionally, Gibson Phillips testified that after Todd’s layoff, there was plenty of work available and a number of employees worked overtime on the Harris Building jobsite. Moreover, during Gibson Phillips five years of employment with the Respondent, there were very few layoffs and those lasted for a day or two, if that.

Under all of the above noted circumstances, I find that the Respondent terminated Todd Phillips on September 23, because of his active role as the leading union adherent, and therefore violated Section 8(a)(1) and (3) of the Act as alleged by the General Counsel. I further conclude that the Respondent failed to demonstrate that it would have taken the same action against Phillips even in the absence of his engaging in union activities.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2) (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening to close its business and discharge union supporters in the event its employees selected a union as bargaining representative, threatening to eliminate work opportunities for employees who supported a union, interrogating its employees concerning their union and/or protected activities and creating the impression of surveillance of its employees union activities, the Respondent violated Section 8(a)(1) of the Act.

4. By suspending Todd Phillips, Gibson Phillips and Dale Barrett for a two week period beginning July 21, 1997, because they engaged in protected concerted activities, the Respondent interfered with, restrained and coerced them in exercising rights guaranteed by Section 7, thereby violating Section 8(a)(1) of the Act.

5. By terminating Todd Phillips on September 23, 1997, because he engaged in union activities, the Respondent violated Section 8(a)(1) and (3) of the Act.

6. The unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having unlawfully suspended employees Todd Phillips, Gibson Phillips and Dale Barrett, it must make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of suspension to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Similarly, having discriminatorily discharged employee Todd Phillips on September 23, 1997, it must make him whole for any loss of earnings and other benefits only from the date of discharge to September 30, 1997, the date that Respondent offered him reinstatement to his former position.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴

ORDER

The Respondent, Nutech Industries, Inc., Queensbury, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees concerning their union membership, sympathy and activity.

⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Threatening employees with closure of the facility in retaliation for the employees' union activities.

(c) Creating the impression of surveillance of its employees union and/or protected concerted activities.

(d) Threatening employees with loss of work in retaliation for their union activities.

(e) Informing its employees that an employee had been laid off because said employee had supported the Union.

(f) Suspending any employees because they engage in protected concerted activities for their mutual aid and protection.

(g) Discharging or otherwise discriminating against any employee for supporting United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Local 229.

(h) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Todd Phillips whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(b) Make Todd Phillips, Gibson Phillips and Dale Barrett whole for any loss of earnings and other benefits suffered as a result of the suspensions taken against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspensions of Todd Phillips, Gibson Phillips and Dale Barrett and the discharge of Todd Phillips and notify the employees in writing that this has been done and that the suspensions and discharge will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Queensbury, New York copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 23, 1997.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. July 23, 1998

Bruce D. Rosenstein
Administrative Law Judge

⁵ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten to close our business and discharge union supporters in the event our employees select a union as bargaining representative, threaten to eliminate work opportunities for employees who support a union, interrogate our employees concerning their union and/or protected activities and create the impression of surveillance of our employees union activities.

WE WILL NOT suspend, discharge or otherwise discriminate against any of you for supporting United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Local 229 or any other union.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make Todd Phillips, Gibson Phillips and Dale Barrett whole for any loss of earnings and other benefits resulting from their suspensions, less any net interim earnings, plus interest.

WE WILL make Todd Phillips whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspensions of Todd Phillips, Gibson Phillips and Dale Barrett and the unlawful discharge of Todd Phillips, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the suspensions and discharge will not be used against them in any way.

(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Albany Resident Office, Leo W. O'Brien Federal Building, Room 342, Clinton Ave. and N. Pearl St., Albany, New York 12207, Telephone 518-431-4155.